CAHAYA UTAMA INDUSTRI SDN. BHD.

v.

KONG KAM PENG

HIGH COURT MALAYA, SHAH ALAM
DATO' JAMES FOONG J
[ORIGINATING SUMMONS NO. 25-7-1995]
14 SEPTEMBER 1995

LAND LAW: *Removal of caveat - Application by plaintiff - Defendant alleging encroachment by plaintiff into his land - Civil action pending - Defendant counterclaiming in suit for a declaration that the boundary of his property be determined and rectification of the document of title - Issues of fraud and misrepresentation raised - Whether the defendant has a caveatable interest - National Land Code s. 323 - Whether there is a serious question to be tried - Balance of convenience - Whether the status quo should be maintained.*

The plaintiffs are the registered owners of property held under HS(M) 9023 for PT 27049, Mukim of Sungai Buluh (the plaintiffs' lot) and the defendants are their neighbours being registered owners of land held under HS(M) 4489 for Lot No. PT 587 (the defendant's lot). The defendant lodged a private caveat on the plaintiffs' lot pending the disposal of Civil Suit 22-160-93 in the High Court and the plaintiffs applied for its removal. The defendant challenged the removal on the basis that there was a serious question to be tried in respect of their counterclaim against the plaintiffs in the pending civil suit.

It was the defendant's contention that the plaintiffs had encroached into his land. He explained that the original title to the plaintiffs' lot (Lot 586) consisted of only 8,092 sq. meters. When final title (Lot 19578) was issued, the land area was increased to 12,600 sq. meters and was partitioned into two, creating the plaintiffs' lot and another title, Lot 27048. The combined area of the plaintiffs' lot and Lot 27048 currently reveals an area of 10,413 sq. meters which discrepancy the defendant claims is due to fraud and misrepresentation by the plaintiffs in inducing the survey department to approve a greater land area than what the plaintiffs were entitled to and which has directly affected the defendant by a reduction in the size of his lot.

Counsel for the plaintiffs contended that the defendant had no caveatable interest over the plaintiffs' lot pursuant to s. 323 of the National Land Code (NLC) as the defendant was only disputing the area involved and not the title or registrable interest over the land. The defendant argued that their counterclaim in the civil suit not only challenged the indefeasibility of the plaintiffs' title in the plaintiffs' lot on grounds of fraud and misrepresentation but also queried the contravention of s. 83(2) of the NLC read with clause 70(a) of the Survey Regulations which only provides a permissible variation of up to 5% in area from a previously surveyed title where the land is under 100 acres.

The issues were whether the defendant had a caveatable interest, whether there was a serious question to be tried and whether on the balance of convenience the *status quo* should be maintained.

Held:

[1] The defendant's claim of encroachment amounts to a claim that the plaintiffs' title and interest is questionable on the ground that the area listed in the document of title to the plaintiffs' lot has been inserted erroneously by fraud and misrepresentation which could render their title defeasible under s. 340 of the NLC. Since there is a claim involving title and interest over a land, the defendant would possess a caveatable interest to lodge a private caveat over the plaintiffs' lot.

[2] The defendant has alleged that the land was approximately about 8,092 sq. meters, and if this is correct then the subsequent title which is Lot 19578 at 12,600 sq. meters would be substantially greater than the original 8092 sq. meters. Greater confusion is now added with the two sub-divided titles of the plaintiffs' lot and Lot 27048 which was born out of Lot 19578 having a combined area of 10,413 sq. meters. Though this is a reduction, the substantial variations at different stages certainly raises a serious question to be tried particularly when there is a claim by the defendant that his lot has been encroached by fraud and misrepresentation.

[3] In the circumstances, the Court is of the view that on a balance of convenience it is better to maintain the *status quo* until the final disposal of the civil suit.

[Plaintiffs' application dismissed. Caveat to remain until final disposal of Civil Suit 22-160-93].

Cases referred to:
Luggage Distributors (M) Sdn. Bhd. v. Tan Hor Teng [1995] 1 MLJ 719 ***(refd)***
Ex parte Solling: Chisholm, Caveator [1893] NSW Law Reports 399 ***(refd)***
Re Hamilton Ex-Parte Iredale [1902] The State Report NSW 117 ***(refd)***
Eng Mee Yong & Ors. v. V. Letchumanan [1979] 2 MLJ 213 ***(refd)***

Legislation referred to:
National Land Code, ss. 83(2), 323(1)(a), 340
Survey Regulations cls. 70(a)

For the plaintiff - C.K. Lim; M/s. Baharuddin & C.K. Lim
For the defendant - Ng Chek; M/s. Ng Chek & Co.

JUDGMENT

James Foong J:

The plaintiffs are the registered owner of a piece of property held under HS(M) 9023 for PT 27049, Subang New Village, Mukim of Sungai Buluh, Daerah Petaling, State of Selangor (hereinafter be referred to as the plaintiffs' lot). The defendant is the plaintiffs' neighbour being registered owner of land held under HS(M) 4489 for Lot No. PT 587, Mukim of Sungei Buluh, Daerah Petaling, State of Selangor (hereinafter be referred to as the defendant's lot).

On plaintiffs' lot, the defendant has placed a private caveat of which the plaintiffs now apply to remove. The defendant challenges this removal on the basis that there is a serious question to be tried in respect of their counter-claim against the plaintiffs in an existing civil action filed in this High Court bearing registration number 22-160-93, and on the balance of convenience, the caveat should remain to maintain *status quo*. The allegation of the defendant's counter-claim is that the plaintiffs have encroached into his land. According to

a the defendant, the original title to the plaintiffs' lot was QT(M) 28 for Lot 586 (hereinafter referred to as Lot 586) which consisted of only 2 acres, and 2 acres would be equivalent to 8,092 sq. meters. Subsequently, when final title to Lot 586 was issued, the land area to this final title - PT 97 for Lot 19578 (hereinafter referred to as Lot 19578) was increased to 12,600 sq. meters. Lot 19578 was then partitioned into two, creating the plaintiffs' lot and another title bearing Lot 27048. The combined area of the plaintiffs' lot and that of Lot 27048 now b reveals approximately 10,413 sq. meters.

From the above, one can observe the vast differences in land area from the original title of the plaintiffs' lot to that of the present. This discrepancy, the defendant claims, is due to fraud and misrepresentation perpetuated by the plaintiffs in inducing the survey department to approve greater land area than what the plaintiffs are legally entitled to, and this increase c has directly affected the defendant by a reduction in the size of his lot.

The plaintiffs did not file any affidavit in reply besides the initial affidavit of support to their application for the removal of the caveat. During trial, the plaintiffs' Counsel stressed mainly on the fact that the defendant has no caveatable interest over the plaintiffs' lot. They submitted that s. 323 of the National Land Code (NLC) clearly states that a private caveat d may only be entered by a person, claiming title to, or registrable interest in, any alienated land or any right to such title or interest." Since the defendant is only disputing the area involved and not the title or registrable interest over the said land, the caveat so lodged by the defendant is unsustainable.

The defendant on the other hand argued that their counter-claim in Civil Suit No. 22-160-93 e questioned the indefeasibility of the plaintiffs' title or interest in plaintiffs' lot due to fraud or misrepresentation. This is substantiated by the enormous differences in area commencing from the original Lot 586 to present situation. This vast differences in area also contravenes Section 83(2) of the NLC which should be read with the clause 70(a) of the Survey Regulations. This regulation only provides a permissible variation of up to 5% in area from f a previous surveyed title where the land is under 100 acres.

A simple calculation will reveal each area stated in title commencing from Lot 586 right up to the plaintiffs' lot having exceeded this permissible level of variation. This case, unlike other usual applications for the removal of caveats involves the physical aspect of the land, in terms of its actual size rather than the ownership, rights, title or interest registrable in the document of title. Section 323(1)(a) of the NLC, as rightly submitted by learned Counsel for g the plaintiffs explicitly applies only to a person claiming title to, or any registrable interest in the said land. As reiterated in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng* [1995] 1 MLJ 719 @ 755, the parameters of caveatability is circumscribed by the word "title" and registrable interest", and "registrable interest pertains to ownership of land or entitlement to leases, charges or easement." Within these confines, do the circumstances of this case bring h the defendant within the category of a person having a caveatable interest?

In order to answer this question, one must determine the actual substance of the defendant's claim. In the opinion of this Court, his claim of encroachment by the plaintiffs at his expense, amounts to a claim that the plaintiffs' title and interest in the plaintiffs' lot is questionable. In short, he is asserting that the plaintiffs are not even the legal owners to the plaintiffs' lot i for reason that the area listed in the document of title to the plaintiffs' lot has been inserted erroneously by fraud and misrepresentation. With this, the defendant is assserting that he may be entitled to a share in the plaintiffs' lot. By this it can only mean a claim to a share in the title and interest of the plaintiffs' lot. This is justifiable, especially when a substantial

area of alleged infringement is involved as in this case. Though the plaintiffs may be the registered proprietors, but their title and interest in this land is not indefeasible by virtue of s. 340 of the NLC, where fraud and/or misrepresentation is involved. Since there is a claim involving title and interest over a land, the defendant would possess a caveatable interest to lodge a private caveat over the plaintiffs' lot.

This view seems to have been shared by our Australian counterpart where a similar Torren System of land registration is being practised. In *Ex parte Solling: Chisholm, Caveator* [1893] NSW Law Reports 399, the appellate Court of New South Wales allowed the caveat to remain under circumstances where the original document of title did not include a strip of land which appeared in a subsequent issue document of title, and this strip of land was the land in respect of which the caveat was lodged. Again in the case of *Re Hamilton Ex-parte Iredale* [1902] The State Report NSW 117, the Chief Justice of New South Wales allowed a caveat to remain on a certificate (title) which was claimed to include land in dispute by reason that the caveators or their predecessors in title had always been in possession of the land.

As the issue of caveatable interest is settled, this Court shall now proceed to examine whether the defendant, as caveator can satisfy this Court that on the evidence presented, his claim to a title or interest in the property does raise a serious question to be tried in accordance with the principles as laid down in the case of *Eng Mee Yong & Ors. v. V. Letchumanan* [1979] 2 MLJ 213.

In the defendant's counter-claims he is seeking *inter-alia* for a declaration that the boundary of his property and that of the plaintiffs be determined, and thereafter the document of title to the plaintiffs' lot be returned to the Land Administrator for rectification. Obviously, in order to determine whether there is any substance to the defendant's allegation one must discover the exact land area in the original title to Lot 586, for this is foundation of the defendant's claim to the substantial differences in each of the subsequent titles. The defendant has alleged that it was approximately 2 acres (or about 8,092 sq. meters), and if this is correct than the subsequent title which is Lot 19578 stated as having 12,600 sq. meters would be substantially greater than the original 8092 sq. meters. Greater confusion is now added with the two sub-divided titles of the plaintiffs' lot and Lot 27048 which was born out of Lot 19578 having a combined area of 10,413 sq. meters. Though this is a reduction, but the substantial variations at different stages certainly raise a serious question to be tried particularly when there is a claim by the defendant that his lot has been encroached by fraud and misrepresentation.

Having decided on the above, this Court is of the view that on a balance of convenience it is better to maintain the *status quo* of the parties until final disposal of Civil Suit 22-160-93. In the event of the plaintiffs' lot is disposed off to a third party by the plaintiffs, there would be greater injustice and would further complicate this delicate matter.

For reasons stated above, this Court hereby dismiss the plaintiffs' application and orders that the caveat so placed by the defendant on the plaintiffs' Lot 27049 to remain until final disposal of Civil Suit 22-160-93 or until further order.